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Public Prosecutor v Yusof bin Saruan

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO M-05(SH)-436–09 OF 2017
UMI KALTHUM, HARMINDAR SINGH AND STEPHEN CHUNG JJCA
9 MAY 2019

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Criminal Law — Murder — Whether intention to kill present — Whether trial judge erred in face of overwhelming evidence to find accused only guilty of culpable homicide not amounting to murder — Whether defence of grave and sudden provocation not available to accused — Whether there was no reason for accused to D *come armed with knife to meet deceased to discuss repayment of debt — Whether accused's stabbing of deceased multiple times disproportionate reaction to angry words spoken by deceased during verbal quarrel — Whether accused knew severity of stab wounds inflicted on deceased would naturally cause death — Whether accused's act of taking away deceased's valuables from his person after killing him* E *showed no impairment in his thinking ability and in fact established motive and preparation for the crime*

The instant appeal was against the High Court's decision to amend the murder charge against the respondent to culpable homicide not amounting to murder F and thereafter convicting and sentencing him to 25 years' jail on that charge. The appellant submitted that the trial judge failed to sufficiently consider the overwhelming evidence of the respondent's intention to kill, the nature of the injuries he inflicted on the deceased and the respondent's conduct before and after the incident which negated any defence of grave and sudden provocation. G In his defence at the trial, the respondent had testified that he was consuming heroin with another person in a house when the respondent's wife reminded him that 'uncle TV' ('the deceased') had been asking for the overdue instalment payments for the television and refridgerator. Later the same day, the respondent met the deceased at a separate venue to discuss the payment of his H debt. They had a quarrel during which, according to the respondent, the deceased had insulted him in a racial way. He said he became so incensed by the deceased's remarks that he lost control of himself and stabbed the deceased with a knife that he usually kept in a basket on his motorcycle. The respondent said he then panicked and fled from the scene but before doing so, took away the I deceased's gold chain, cellphone and money from his wallet. The trial judge held that the act which caused the deceased's death was unplanned and spontaneous and done while the respondent was under the influence of heroin and provoked by the inflammatory words used by the deceased. For those reasons, and on the ground of grave and sudden provocation, the trial judge

downgraded the charge to culpable homicide not amounting to murder. A

Held, unanimously allowing the appeal, replacing the conviction and sentence for culpable homicide not amounting to murder with a conviction for murder and sentencing the respondent to death:

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(1) The trial court's decision was against the weight of the evidence which warranted a conviction for murder under s 302 of the Penal Code. The trial judge failed to consider various compelling evidence adduced by the prosecution including: (a) the post-mortem report and testimony of the pathologist showing that multiple stab wounds had been inflicted upon several vital organs of the deceased. There was little doubt that there was at least the intention to cause such bodily injury which was sufficient in the ordinary course of nature to cause death. The respondent knew that the injuries would cause the deceased's death. So, intention under s 300(b) and (c) of the Penal Code had been proven; (b) the respondent's conduct on the day of the incident which bore out his intention to inflict those injuries. He had brought along a knife when he came to meet the deceased. There was some discrepancy as to whether the knife was always in the motorcycle (basket) or whether he had specifically brought it from his house that day. Giving the respondent the benefit of any doubt, there was no reason for him to have had a knife in hand when he was having the argument with the deceased; and (c) that after stabbing the deceased multiple times, the respondent took away the deceased's wallet, gold chain and cellphone. He gave the gold chain to SP19 who pawned it for money. From the wallet, he threw away the deceased's identity card and driving licence and kept the money. This was all conduct relevant under s 8 of the Evidence Act 1950 establishing motive and preparation for the crime. There was clearly insufficient consideration of all these matters by the trial judge (see paras 16, 18–20 & 32).

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(2) The trial judge erred in holding that the defence of grave and sudden provocation had been established. A mere statement by an accused that he had lost his self-control was insufficient. The test of gravity was an objective one, ie, would the provocation have caused a reasonable man to lose his self-control. By this test, an unusually excitable or pugnacious individual or one who was unusually sensitive or hot-tempered would be excluded. The law had to be applied evenly as otherwise persons who were hot-tempered or had a thin skin would always escape the heavier punishment (see paras 23 & 26).

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(3) The respondent's act failed the 'grave and sudden' requirement of provocation and was out of proportion to the gravity of the provocation. The provocation was at most mere verbal abuse for a debt due. The deceased was unarmed and was only trying to recover his debt. There was no reason for the respondent to lose his self-control. Bringing a knife and

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stabbing someone multiple times after a mere verbal spat was a thoroughly disproportionate act (see paras 21 & 24–25).

(4) The circumstances showed that the respondent was not under any impairment in his thinking ability. He had the presence of mind to scoot away with the belongings of the deceased after killing him. He was able to decide to throw away the deceased's identity card and driving licence. The respondent's claim that he panicked on stabbing the deceased rang hollow as he made the conscious decision of taking the valuables of the person he had just killed (see para 26).

(5) The trial judge's finding that the respondent was a truthful witness based on his demeanour in court was insufficient to override the overwhelming and uncontroverted evidence against him. It was far better to determine the truthfulness of a witness by a critical examination of his testimony against the whole of the evidence adduced at trial. Demeanour should be the least weighty element in determining credibility (see paras 30–31).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap keputusan Mahkamah Tinggi untuk meminda pertuduhan bunuh terhadap responden kepada homisid salah yang tidak menjumlahkan kepada pembunuhan dan selepas itu menyabitkan dan menjatuhkan hukuman penjara 25 tahun atas tuduhan itu. Perayu telah menghujahkan bahawa hakim bicara gagal mempertimbangkan keterangan yang sangat besar tentang niat responden untuk membunuh, sifat kecederaan yang dilakukannya terhadap si mati dan tindakan responden sebelum dan selepas kejadian yang menafikan sebarang pembelaan bangkitan marah besar dan mengejut. Dalam pembelaannya di perbicaraan itu, responden telah memberi keterangan bahawa dia menggunakan heroin dengan orang lain di rumah apabila isteri responden mengingatkannya bahawa 'pakcik TV' ('si mati') telah meminta pembayaran ansuran tertunggak untuk televisyen dan peti sejuk. Kemudian pada hari yang sama, responden bertemu si mati di tempat berasingan untuk membincangkan pembayaran hutangnya. Mereka bertengkar dimana, menurut responden, si mati telah menghina beliau dengan cara perkauman. Dia berkata bahawa dia menjadi sangat marah dengan kata-kata si mati bahawa dia telah hilang kawalan diri dan menikam si mati dengan pisau yang biasanya disimpan di dalam bakul motosikalnya. Responden berkata, dia kemudian panik dan melarikan diri dari tempat kejadian tetapi sebelum berbuat demikian, mengambil rantai emas, telefon bimbit dan wang dari dompet si mati. Hakim bicara memutuskan bahawa tindakan yang mengakibatkan kematian si mati itu tidak dirancang dan spontan dan dilakukan sementara responden berada di bawah pengaruh heroin dan dibangkitkan oleh kata-kata berapi-api yang digunakan oleh si mati. Atas sebab-sebab itu, dan atas alasan bangkitan marah besar dan mengejut, hakim bicara menurunkan tuduhan kepada homisid salah yang tidak menjumlahkan kepada pembunuhan.

Diputuskan, sebulat suara membenarkan rayuan, menggantikan sabitan dan hukuman bagi homisid salah yang tidak menjumlahkan kepada pembunuhan dengan sabitan untuk bunuh dan menjatuhkan hukuman mati ke atas responden:

(1) Keputusan mahkamah bicara bertentangan dengan penerimaan keterangan yang membenarkan sabitan untuk bunuh di bawah s 302 Kanun Keseksaan. Hakim bicara gagal mempertimbangkan mempertimbangkan keterangan yang dikemukakan oleh pihak pendakwaan termasuk: (a) laporan bedah siasat dan testimoni ahli patologi menunjukkan bahawa banyak luka tikaman telah dikenakan pada beberapa organ vital si mati. Terdapat sedikit keraguan bahawa terdapat sekurang-kurangnya niat untuk menyebabkan kecederaan tubuh badan yang mencukupi dalam perjalanan biasa sifat untuk menyebabkan kematian. Responden tahu bahawa kecederaan akan menyebabkan kematian si mati. Oleh itu, niat di bawah s 300(b) dan (c) Kanun Keseksaan telah dibuktikan; (b) tingkah laku responden pada hari kejadian yang menimbulkan hasratnya untuk menimbulkan kecederaan tersebut. Dia membawa pisau ketika dia datang menemui si mati. Terdapat beberapa percanggahan sama ada pisau itu sentiasa di dalam motosikal (bakul) atau sama ada dia telah membawanya keluar dari rumahnya pada hari itu. Memberi manfaat atas apa-apa keraguan kepada responden, tidak ada alasan baginya untuk mempunyai pisau di tangan ketika dia mempunyai pertengkaran dengan si mati; (c) bahawa setelah menikam si mati beberapa kali, responden mengambil dompet si mati, rantai emas dan telefon bimbit. Dia memberikan rantai emas kepada SP19 yang mengadainya dengan wang. Daripada dompet, dia melemparkan kad pengenalan dan lesen memandu si mati dan menyimpan wang itu. Tindakan ini semua relevan di bawah s 8 Akta Keterangan 1950 yang membina motif dan penyediaan jenayah. Terdapat pertimbangan yang tidak mencukupi untuk semua perkara ini oleh hakim bicara (lihat perenggan 16, 18–20 & 32).

(2) Hakim bicara terkhilaf memutuskan bahawa pembelaan bangkitan marah besar dan mengejut telah dibentuk. Kenyataan semata-mata oleh seorang tertuduh bahawa dia telah hilang kawalan diri tidak mencukupi. Ujian keseriusan adalah satu yang objektif, iaitu, bangkitan marah telah menyebabkan seseorang yang munasabah kehilangan kawalan dirinya. Dengan ujian ini, individu yang resah atau agresif secara luar biasa akan dikecualikan. Undang-undang perlu digunakan dengan sama jika tidak orang yang panas baran atau sensitif akan terlepas hukuman yang lebih berat (lihat perenggan 23 & 26).

(3) Tindakan responden gagal dalam syarat-syarat bangkitan marah besar dan mengejut telah melampaui keseriusan bangkitan marah. Bangkitan marah itu paling banyak hanyalah verbal semata-mata untuk hutang

yang perlu dibayar. Si mati tidak bersenjata dan hanya cuba mendapatkan kembali hutangnya. Tidak ada alasan untuk responden kehilangan kawalan diri. Membawa pisau dan menusuk seseorang berkali-kali selepas pertengkaran lisan semata-mata adalah perbuatan yang berlebih-lebihan (lihat perenggan 21 & 24–25).

(4) Keadaan ini menunjukkan bahawa responden tidak mengalami kecacatan dalam keupayaan pemikirannya. Dia mempunyai kesedaran minda untuk mengusik barang-barang milik si mati setelah membunuhnya. Dia dapat membuat keputusan untuk membuang kad pengenalan dan lesen memandu si mati. Tuntutan responden bahawa dia panik ketika menikam si mati merupakan lompong ketika dia membuat keputusan sedar mengambil barang-barang berharga daripada orang yang baru saja dibunuh (lihat perenggan 26).

(5) Penemuan hakim bicara bahawa responden adalah saksi yang benar berdasarkan sikapnya di mahkamah adalah tidak mencukupi untuk menolak bukti yang sangat berat dan tidak bertentangan terhadapnya. Adalah lebih baik untuk menentukan kebenaran seorang saksi dengan pemeriksaan kritikal terhadap kesaksiannya terhadap seluruh keterangan yang dikemukakan semasa perbicaraan. Sikap harus menjadi unsur paling ringan dalam menentukan kredibiliti (lihat perenggan 30–31).]

Notes

For cases on whether intention to kill present, see 4(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1992–1993.

Cases referred to

Lee Kwai Heong & Anor v PP [2006] 2 MLJ 528; [2006] 1 CLJ 1043, CA (refd)

Lorensus Tukan v PP [1988] 1 MLJ 251; [1988] 1 CLJ Rep 162, SC (refd)

Mancini v Director of Public Prosecutions [1941] 3 All ER 272; [1942] AC 1, HL (refd)

Legislation referred to

Penal Code ss 299, 300, 300(b), (c), Exception 1, 302, 304(a)

Nik Syahril Nik Ab Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

Azrul Zulkifli Stork (Fahmi Sulaiman with him) (Azharudin & Assoc) for the respondent.

Harmindar Singh JCA (delivering judgment of the court):

[1] The respondent faced a charge of murder under s 302 of the Penal Code. The charge read as follows:

Bahawa kamu pada 31.7.2013 jam lebih kurang 2.30 petang sehingga jam lebih kurang 10.00 malam, di hadapan Stesen Janakuasa Power Tek Telok Gong, Kuala Sungai Baru, di dalam daerah Alor Gajah, di dalam Negeri Melaka, telah melakukan kesalahan bunuh dengan menyebabkan kematian terhadap seorang lelaki bernama Oh Son Liong (No K/P: 581225-04-5057). Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] The respondent claimed trial. At the end of the case of the prosecution, the learned judicial commissioner ('judge') in the High Court amended the charge to one of culpable homicide not amounting to murder under s 304(a) of the Penal Code. The respondent pleaded guilty to this amended charge. He was sentenced to 25 years imprisonment with effect from date of arrest.

[3] After an appeal by the prosecution, this court allowed the appeal and ordered the respondent to enter his defence on the original charge of murder. Back in the High Court, and after hearing the case for the defence, the learned judge again found the respondent guilty of the offence of culpable homicide not amounting to murder under s 304(a) of the Penal Code. He was again convicted and sentenced to 25 years imprisonment from date of arrest. The order by the High Court was made on 8 September 2017.

[4] The public prosecutor then filed this appeal. The appeal was heard on 4 March 2019. At the conclusion of the submissions, we unanimously allowed the appeal. We set aside the conviction and sentence under s 304(a) of the Penal Code and substituted it with a conviction of murder under s 302 of the Penal Code. The respondent was sentenced to death. Our reasons for doing so now follow. This will form the judgment of the court.

THE BACKGROUND

[5] Since there was no appeal by the respondent, the only issue in this appeal was whether the respondent ought to have been convicted for murder and not, as the learned judge found, guilty only of culpable homicide not amounting to murder under s 304(a) of the Penal Code.

[6] The salient facts leading to the conviction of the respondent can be gathered from the version of the events given by the respondent at the trial. On 31 July 2013, the respondent was in the house of SP19, Suhana bt Yaakob and SP23, Mohd Hafiz bin Yaakob. The respondent and SP23 were taking illicit drugs at the time. Whilst in the house, SP22, Rohani bt Kassim, who was the wife of the respondent, told the respondent that the 'uncle TV' (a reference to the deceased Oh Son Liong) was asking for the instalment payments for the television and the refrigerator. On the same day, the respondent had also

received a call from the deceased who told him to meet him ('the deceased') at the vicinity of the power generation factory known as Powertech.

[7] When the respondent arrived at the Powertech factory, a quarrel took place between him and the deceased. According to the respondent, the deceased had uttered insulting words to him. He claimed that the deceased said that it was 'susah berurusan dengan orang Melayu dan juga Melayu bangsat'. The respondent said he became very angry and could not control himself. He then said that he was 'dalam keadaan tidak sedar apa berlaku, kemudian menyedari telah menikam 'uncle TV' dengan pisau yang berada di dalam bakul motosikal'. In a state of panic, the respondent then ran away from the scene, but not before taking some valuables of the deceased.

[8] At the end of the prosecution's case, the learned judge amended the charge to one of culpable homicide under s 304(a) of the Penal Code. The learned judge was of the view that the killing of the deceased was a spontaneous act by the respondent without any preplanning. The learned judge was also of the view that there was a doubt as to the mental state of the respondent as the respondent was under the influence of the heroin, an illicit drug which caused the respondent to lose focus.

[9] The learned judge also considered that the inflammatory words used by the deceased caused the respondent to lose his mind. Coupled with the fact that he was under the influence of drugs at the time, the learned judge held that the respondent was unable to control himself from stabbing the deceased. For these reasons, the charge was amended to one of culpable homicide under s 304(a) of the Penal Code.

[10] On appeal to this court, the appeal was allowed. The respondent was ordered to enter his defence on the original charge of murder. Although no written grounds of decision were available, it was obvious that this court was not impressed with the reasons given by the trial judge to reduce the charge to one of culpable homicide. After the defence had completed their case, the learned judge again found the respondent guilty under the reduced charge of culpable homicide and sentenced the respondent to the same punishment of 25 years imprisonment.

[11] In coming to his decision, the learned judge provided the same justification for his decision as follows (para 13 of grounds of judgment):

> Pertama sekali adalah OKT tidak pergi mencari simati. Kedua, keterangan pihak pendakwaan sendiri menunjukkan bahawa pada setiap masa, pisau yang dikatakan yang digunakan untuk menikam simati berada dalam bakul motosikal OKT. Ketiga, keterangan saksi pendakwaan sendiri menunjukkan bahawa OKT merupakan seorang penagih dadah yang tegar. Tiga fakta ini mempengaruhi

keputusan saya pada hari ini. Saya mendapati berdasarkan keterangan yang ada, wujud fakta-fakta yang menunjukkan bahawa kejadian berlaku tanpa dirancang. Dengan kata lain kejadian OKT menikam simati berlaku 'at the spour (sic) of the moment', dalam mana keadaan situasi tegang. Apa yang lebih penting lagi pada saya pada ketika ini adalah apabila OKT disoal samada beliau tahu simati mati atau tidak, beliau kata beliau tidak tahu, tahu-tahu dah ditikam. Fakta-fakta ini menjuruskan bahawa keterangan yang ada tidak cukup untuk membuktikan bahawa OKT telah melakukan kesalahan bunuh sepertimana yang ditakrifkan di bawah s 302 Kanun Keseksaan.

[12] The learned judge also appeared to accept the defence of grave and sudden provocation for the same reasons given at the end of the prosecution's case. For good measure, the learned judge also stated that he was impressed ('kagum') with the way the respondent answered questions during cross-examination. His calm demeanour in doing so and without hesitation was a strong factor as to why the learned judge accepted the respondent's testimony.

THE INSTANT APPEAL

[13] Before us, although several grounds were listed in the petition of appeal, the learned deputy public prosecutor ('DPP') attacked the findings of the learned trial judge on two main planks. The first was that the evidence relating to the intention to kill was not sufficiently considered by the learned judge. The learned judge did not take into account the nature and severity of the injuries to vital organs of the deceased. The second was that the conduct of the respondent prior to and after the incident, which negated any defence of grave and sudden provocation and lack of intention, was not considered by the learned judge.

WHETHER MURDER OR CULPABLE HOMICIDE NOT AMOUNTING TO MURDER

[14] In our view, the crux of the learned DPP's submission concerns the question of whether, after considering all the circumstances in this case, it had been sufficiently established that there was the necessary intention to cause death as required by law, specifically s 300 of the Penal Code. Section 300 of the Penal Code reads as follows:

300 Except in the cases hereinafter excepted, culpable homicide is murder —

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[15] Now, as alluded to earlier, the learned judge had on two occasions ruled that the evidence established only a charge for culpable homicide and not murder. The reasons for coming to this conclusion were also set out earlier. The learned DPP had urged upon us that the conviction should be for the offence of murder under s 302 of the Penal Code as the learned judge had failed to sufficiently consider the overwhelming evidence establishing the necessary intention under s 300 of the Penal Code.

[16] In this context, we agreed that learned judge was in error in failing to consider various compelling evidence adduced by the prosecution. Firstly, there was the evidence of the post-mortem report on the deceased (exh P60 at pp 187–192 of appeal record Vol 3) and the court testimony of the pathologist SP14. That post-mortem report concluded as follows:

> Postmortem examination revealed multiple stabbed wounds on the body which had penetrated internally to cause injuries namely to the rib cage, pericardium and heart, diaphragm, stomach, liver and small intestines which had led to his death. These stabbed wounds to the body were consistent with infliction by a sharp, penetrating object and was of homicidal in manner. ... In my opinion, the cause of death is attributable to the multiple stabbed wounds to the body as sustained by the deceased.

[17] It is a fundamental principle in criminal law that the burden of proving any criminal charge is on the prosecution throughout the case and never shifts to an accused person. If the prosecution fails to discharge this burden, the case made out may be one of culpable homicide not amounting to murder as depicted in s 299 of the Penal Code. So the question before us, and indeed the trial judge, was whether the elements of the charge of murder under s 300 of the Penal Code had been established beyond reasonable doubt.

[18] In the instant case, taking into account the multiple stab wounds inflicted on vital organs in the body, there can be little doubt that there was at least the intention to cause such bodily injury which was sufficient in the ordinary course of nature to cause death. In fact, the bodily injury caused was such that the respondent knew would cause the death of the deceased. So, intention under elements (b) and (c) of s 300 of the Penal Code was proved.

[19] Secondly, the conduct of the respondent on the day of the incident bears out his intention to inflict those injuries. He had brought a knife with him on the day of the incident. There was some discrepancy as to whether the said knife was always in the motorcycle or whether he had specifically taken the knife from his house on that fateful day. Giving the respondent the benefit of any doubt, there was no reason for him to have the knife in his hand when the argument took place between him and the deceased.

[20] What is also compelling is that after having stabbed the deceased multiple times, the respondent had also taken the valuables of the deceased. He had admitted in his evidence to taking the wallet, gold chain and a Sony Ericson mobile phone from the deceased after he had killed him. This gold chain was subsequently given to SP19 who then pawned it for money. The respondent also admitted that after taking the wallet from the deceased, he had thrown away the identity card and driving licence and kept the money in it. This was all conduct relevant under s 8 of the Evidence Act 1950 to establish motive and preparation for the crime. With respect, there was clearly insufficient consideration of all these matters by the learned judge.

[21] Now, the learned judge appeared to place much emphasis on the defence of grave and sudden provocation as provided by Exception 1 to s 300 of the Penal Code. The evidence was that the respondent was gravely provoked by the words used by the deceased 'susah berurusan dengan orang Melayu' and 'Melayu bangsat'. The words 'Melayu bangsat' did not appear in the police statement of the respondent (D83) and were only revealed by him in his evidence. Even giving the respondent the benefit of the doubt, there was no reason for the respondent to lose his self-control as the deceased was only trying to recover the debt that was owed to him. The deceased was also unarmed on that fateful day.

[22] The law on what amounts to grave and sudden provocation is well-settled. In *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ Rep 162, the Supreme Court through the judgment of George Seah SCJ observed (at p 253 (MLJ); p 165 (CLJ)):

> The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v State of Maharashtra* [1962] AIR SC 602).

[23] So, in order to set up provocation as a defence to reduce the offence of murder to one of culpable homicide, it is necessary to show such grave and sudden provocation as would cause any reasonable person to lose his or her self-control as provided by Exception 1 to s 300 of the Penal Code. In this way, a mere statement by an accused that he lost his self-control is insufficient. The

A test of gravity is an objective one. So the test is: would such provocation cause a reasonable man to lose his self-control. By this test, an 'unusually excitable or pugnacious individual' is excluded (see *Mancini v Director of Public Prosecutions* [1941] 3 All ER 272; [1942] AC 1). So would a person who is unusually sensitive or is hot tempered. The law must be applied evenly as otherwise persons who are hot tempered or have a thin skin would always escape the heavier punishment.

[24] Nevertheless, what is grave to the point of causing loss of self-control is a question of fact which depends on the facts and circumstances of each case. Even so, the type and manner of retaliation must not be disproportionate to the provocation. So, for example, bringing a knife and stabbing someone multiple times after a mere verbal spat would be thoroughly disproportionate.

[25] Reverting to the instant appeal, it appeared to us that the action of the respondent was certainly out of proportion to the gravity of the provocation. The nature of the provocation was at most mere verbal abuse for a debt due. Such provocation would not be met by any reasonable person with multiple stab wounds to vital organs of the body. In our considered view, the actions of the respondent must fail the 'grave and sudden' requirement of provocation. The response of the respondent to mere verbal abuse, and that too by an unarmed man, informed us that he was a callous man with a total disregard of human life.

[26] In our respectful view, the learned judge was in error in holding that grave and sudden provocation had been established. The learned judge may have been persuaded by the possibility that the respondent's decision making ability was impaired as he was under the influence of drugs at the material time. However, as we had earlier reiterated, the law must be applied evenly. In any case, what is noteworthy is that the respondent had the presence of mind to scoot away with the belongings of the deceased after killing him. He was also able to decide to throw away the identification card and driving licence of the deceased. In our view, the respondent was not under any impairment of his thinking ability. His response that he panicked rang hollow after he made the conscious decision of taking the valuables of the person he had just killed.

[27] Now, the learned judge also noted the impressive manner in which the respondent gave evidence in court and especially the way in which he answered questions without hesitation during cross-examination. In short, the demeanour of the respondent in the witness box suggested to the learned judge that he was a truthful witness.

[28] In this regard, we must hasten to observe that demeanour in the courtroom is not always a reliable guide to credibility. A consummate liar may

be completely calm and unruffled by any stress during cross-examination. And there is usually some delay between arrest and trial. Hence there is plenty of time to prepare and rehearse answers to possible questions.

[29] On the other hand, an honest but anxious witness terrified of being disbelieved would be nervous when giving answers in the courtroom thus projecting a shaky demeanour. To add to the adversity, advocates are often quick to take advantage of such a witness to manipulate demeanour and destroy the credibility of an otherwise truthful witness. This is not helped by the sometimes tense atmosphere in the courtroom which can also by itself engender anxiety in any witness and more so one with poor education or limited intelligence. The unfortunate result is that such a witness may be wrongly perceived by the judge to be untruthful.

[30] So, a judge in a courtroom is in no position to place complete faith in demeanour as a guide to honesty. It would be far better to determine the truthfulness of a witness by a critical examination of his testimony with the whole of the evidence adduced at the trial. His testimony may be consistent or inconsistent with the established facts and circumstances or may be corroborated by other evidence at the trial. Certainly demeanour should be the least weighty element in determining credibility (see *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528; [2006] 1 CLJ 1043).

[31] In the instant case, we did not think that the demeanour of the respondent as noted by the learned judge was sufficient to override the overwhelming and uncontroverted evidence against the respondent. As alluded to earlier, the respondent had committed a vile and reprehensible act with the requisite intention to cause death.

CONCLUSION

[32] In the circumstances, and for the reasons we have given, we were of the view that there were merits in the appeal. The decision of the High Court was against the weight of evidence. Having scrutinised the whole of the evidence, and for the reasons provided, a conviction for murder under s 302 of the Penal Code was warranted. Accordingly, we set aside the conviction and sentence for culpable homicide not amounting to murder and substituted it with a conviction for murder under s 302 of the Penal Code. As a necessary consequence, the respondent was sentenced to death as required by law.

Order accordingly.

Reported by Ashok Kumar